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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THE PEOPLE,

Plaintiff and Respondent,

v.

SHARIEF OSMAN SHENDI,

Defendant and Appellant.

C064289

(Super. Ct. No.
CRF090002002)

A jury found defendant Sharief Osman Shendi guilty of battery causing serious bodily injury and found true an allegation that he had been convicted of a serious felony as well as allegations that he had previously served three separate prison terms. The court sentenced defendant to an aggregate term of 12 years in prison.

On appeal, defendant argues he was denied a fair trial because of prosecutorial misconduct in closing argument and that his attorney was ineffective for failing to object to the misconduct. Defendant also claims the trial court abused its discretion when it denied his motion for a new trial based on

the alleged misconduct. Lastly, defendant argues that at least two of the prior prison term enhancements should have been stricken instead of stayed.

We reject defendant's assertion of prosecutorial misconduct and related claims but agree that two of the prior prison term enhancement findings must be stricken. Accordingly, we will modify the judgment to correct this sentencing error and affirm the judgment as modified.

FACTUAL BACKGROUND

From February to August 2009, defendant and Aaron Galindo were roommates, living in Sutter County with defendant's stepmother, Mary, and defendant's stepbrother, Greg. Defendant and Galindo shared a room in the house; defendant would use the room when he stayed there a couple days per week, and Galindo would use it the rest of the time. On days when defendant was home, Galindo slept on the couch in the living room.

On the afternoon of August 12, 2009, Galindo was watching television in the living room with his girlfriend, Chrystal Allen. Defendant was the only other person in the house. Galindo asked defendant if he and Allen could use the shared bedroom for "sexual purposes."

After Galindo and Allen left the room, defendant asked Galindo which bed he had used. Galindo responded they used the bed he and defendant both used. Galindo and Allen returned to the living room to watch television, and defendant told them they needed to leave until either Greg or Mary returned. Galindo declined, said he had a right to be there because he

paid rent, and suggested he should call Mary to "see what she says." Galindo then used his cell phone to call Mary. When Galindo began speaking to her, defendant got "right in [Galindo's] face." When Galindo asked defendant to step back, defendant started hitting him. Defendant struck Galindo multiple times in the face and head with his fist, and Galindo curled into the fetal position to try to defend himself. Galindo testified defendant struck him continuously for five minutes and that he never struck back. Galindo asked defendant to stop hitting him and offered to leave, but defendant continued the attack.

Allen came out of the bathroom, saw the attack, and yelled at defendant to stop. Defendant told Allen if she did not "shut [her] mouth," he would continue hitting Galindo. Defendant hit Galindo a couple more times, then stopped and asked him to leave again. Galindo was bleeding from the nose and mouth, received a cut on the back of his head, and described a throbbing pain on the side of his face. Galindo asked defendant to bring him his things and defendant did so. Before Galindo and Allen left, Allen called Mary again; defendant became aggravated and threatened to hit Allen if they did not leave. Allen then drove Galindo to his parents' house, where his mother called the police. The police arrived, interviewed Galindo and Allen, and photographed Galindo's injuries. Galindo was treated by ambulance personnel, then transported to the hospital.

Dr. Mark Agness was the emergency room physician who treated Galindo for his injuries. Dr. Agness diagnosed Galindo

with facial trauma, a blow-out fracture of the left eye socket, and a comminuted nasal fracture. Galindo was at the hospital for about five hours and was in pain for about a week and one-half after the attack. Galindo also testified his nose curves to the right and his vision is blurry as a result of the attack.

Officer Charles Clark of the Yuba City Police Department testified that he interviewed Galindo after the attack. Galindo told Officer Clark he had been attacked and identified defendant as the attacker. Officer Clark and two other police officers went to the residence but did not find defendant. Officer Clark did notice some blood on the porch near the front door. The next day Officer Clark located and interviewed defendant. After waiving his *Miranda*¹ rights, defendant told Officer Clark that he was sleeping in his room when Galindo woke him and asked if he and Allen could use the room to change their clothes. Defendant allowed them to use the room; after 10 to 15 minutes, defendant knocked on the door. When Galindo opened the door, defendant noticed he was shirtless and sweaty. Defendant asked Galindo if he had sex in the room and Galindo said yes. Defendant went into the room, smelled "sex," and noticed what appeared to be bodily fluid on his pillow.

Defendant then told Galindo to leave, but he refused. Defendant claimed Galindo said "I'm not letting no nigger tell me what to do." Defendant confronted Galindo, who responded by

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

pushing him. Defendant then attacked Galindo with his fists, and Galindo tried to fight back. Eventually Galindo curled up on the ground and defendant ceased his attack. Defendant then told Galindo and Allen to leave again. After defendant confronted them again on the porch, Galindo and Allen left. Officer Clark did not recall seeing any injuries on defendant, and defendant did not report any injuries from the fight.

The defense presented only one witness, private investigator Barry Roper. Roper testified that he interviewed Allen and that she told him Galindo had a temper, "a short fuse," and is quick to raise his voice. Defendant did not testify.

DISCUSSION

I

Prosecutorial Misconduct

On appeal defendant claims his due process rights and right to a fair trial were violated by misconduct committed by the prosecutor. Defendant alleges three instances of misconduct, all of which occurred during closing argument. First, the prosecutor misstated the law when she said "[t]he defense has to [prove] that the defendant acted in lawful self-defense." Second, the prosecutor misstated the law when she suggested that defendant could have removed himself from the situation rather than stay and engage in the fight. Finally, the prosecutor improperly vouched for Galindo when she repeatedly referred to him as a "victim."

Defendant's counsel did not object to any of these instances of alleged misconduct. We conclude all defendant's claims of prosecutorial misconduct were forfeited by defense counsel's failure to object in the trial court.

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "an admonition would not have cured the harm caused by the misconduct.'" [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

Defendant offers three arguments to avoid forfeiture of his misconduct claims. None has merit.

First, defendant argues he has not waived his right to raise this issue on appeal because the alleged misconduct affected his substantial rights. Defendant cites *People v. Johnson* (2004) 115 Cal.App.4th 1169 and *People v. Johnson* (2004) 119 Cal.App.4th 976 for the proposition that "instructions or

arguments which reduce the prosecution's burden of proof potentially affect a defendant's substantial rights, and such errors are not waived by the defendant's failure to object." Both of these cases, however, deal with erroneous jury instructions and not statements made by the prosecutor during closing arguments. Moreover, both cases are based on Penal Code section 1259,² which does not apply here. Thus, defendant's argument is without merit.

Second, defendant notes that he raised the issue of prosecutorial misconduct at the trial court in his motion for a new trial. However, the motion for a new trial does not constitute a *timely* objection; defendant made the motion well after the alleged misconduct occurred and after the trial court's ability to cure any potential prejudice with an admonition had expired. Thus, defendant's motion is irrelevant to the forfeiture issue (although we *will* separately consider defendant's argument that the trial court erred in denying his new trial motion).

Finally, defendant argues we should address the merits of his misconduct claims as a part of his ineffective assistance of counsel claim. To the extent -- and only to the extent -- defendant argues that his trial attorney was ineffective in

² Penal Code section 1259 provides, in relevant part, "[t]he appellate court may also review any *instruction* given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (*Italics added.*)

failing to object to the alleged misconduct, we will address the alleged misconduct in addressing the ineffective assistance of counsel claim.

II

Ineffective Assistance Of Counsel

Defendant argues he was denied effective assistance of counsel when his attorney failed to object to the prosecutor's "mis[s]tate[ment of] the law to the jury on a critical issue." By this, we understand defendant to refer to the first instance of alleged misconduct discussed above, i.e., the prosecutor's misstatement of the law of self-defense. We disagree.³

"Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing of either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Here, defendant is unable to show any prejudice caused by his counsel's failure to object to the alleged misconduct.

³ Because defendant does not rely on either of his other claims of misconduct as a basis for his ineffective assistance of counsel claim, we do not discuss them further.

Accordingly, he cannot satisfy the second prong of the analysis and his ineffective assistance claim is without merit.

Defendant claims his attorney should have objected when the prosecutor stated the defense had the burden of establishing self-defense. Clearly, the prosecutor misstated the law. However, she then proceeded to discuss the evidence that negated defendant's self-defense claim. Furthermore, defense counsel began his rebuttal argument by refuting the prosecutor's misstatement of the law. Finally, and most significantly, the jury was properly instructed with CALCRIM No. 3470: "Right to Self-Defense." The instruction given provided as follows: "[T]he People have the burden of proof beyond a reasonable doubt that the defendant did not act in lawful self-defense." In addition, the court told the jurors it would instruct them on the law that applied to the case and to disregard statements made by the attorneys if they conflicted with the court's instructions. We presume the jury follows the instructions it is given. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1014.) Under these circumstances, the prosecutor's misstatement was not prejudicial and thus cannot form the foundation for an ineffective assistance claim.

III

Denial Of Motion For A New Trial

Defendant claims the trial court abused its discretion when it denied his motion for a new trial. Defendant based his motion on the previously mentioned instances of alleged prosecutorial misconduct and other grounds. On appeal,

defendant develops only the prosecutorial misconduct basis for the motion; therefore, we will not address the other bases argued in the trial court.

We review the trial court's denial of a new trial motion for abuse of discretion. (*People v. Ochoa* (1998) 19 Cal.4th 353, 473.) We find none here.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

While the prosecutor plainly misstated the law of self-defense, the trial court could have reasonably concluded that this single misstatement did not arise to the level of misconduct because the prosecutor did not intentionally try to use deceptive or reprehensible methods to attempt to persuade the jury. Beyond that, neither of the other instances of alleged misconduct cited by defendant was objectionable, let alone misconduct.

Defendant contended it was misconduct when the prosecutor noted that defendant chose to remain in the residence and fight with Galindo instead of taking "alternative actions." According to defendant, this was a misstatement of the law because it left the jury with the impression that defendant "had an obligation

to take some alternative step to standing his ground." The trial court could have reasonably concluded, however, that this comment by the prosecutor was not a comment on the law. Instead, she was merely commenting on the facts of the case that were supported by the prosecution's evidence. Because the prosecutor's statement in this regard was not objectionable, it plainly was not misconduct.

As for defendant's assertion that the prosecutor's repeated references to Galindo as a "victim" was misconduct because it constituted "impermissible vouching for [the] witness," the trial court could have reasonably rejected that claim as well. Improper vouching involves an attempt to bolster a witness by reference to facts outside the record. (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.) It is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office. (*Ibid.*) "A prosecutor may express his opinion of a defendant's guilt unless the statement appears to be based on information not presented at trial." (*People v. Brown* (1981) 119 Cal.App.3d 116, 133.)

Here, the prosecutor did not vouch for Galindo's veracity or credibility based on facts outside the record. The prosecution presented evidence that defendant started a fight with Galindo and that Galindo received substantial injuries as a result. Thus, even assuming the term "victim" may be construed as implying fault for defendant's role in the fight, the prosecutor's characterization of Galindo was not improper

because it was based on evidence within the record. Indeed, the fact that the prosecution charged defendant necessarily implies the prosecutor believed him to be guilty and believed that Galindo was the "victim" of defendant's crime. The prosecutor's reference to Galindo as a "victim" during the closing arguments was entirely unobjectionable and not misconduct.

Because defendant did not establish any prosecutorial misconduct, the trial court did not abuse its discretion when it denied his motion for a new trial on that ground.

IV

Prior Prison Term Enhancements

Penal Code section 667.5, subdivision (b) provides that "[e]nhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: [¶] . . . [¶]

(b) [W]here the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior *separate* prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction." (Italics added.) The limitation on separate prison terms is reiterated in Penal Code section 667.5, subdivision (e).

The amended information in this case alleged that defendant had three prior convictions -- one for carrying a concealed

weapon, one for carrying a loaded firearm, and one for first degree burglary -- for which he had served separate prison terms. The jury found each allegation true. However, defendant in fact served only a *single* prison term for all three of the convictions. Indeed, the People admitted as much in the trial court in their sentencing brief.

At the sentencing hearing, the trial court stated that "for the enhancement, pursuant to [Penal Code, section] 667.5(b)(3), that counts as an additional one year." The minutes of the hearing show that the court imposed "1 year consecutive for the 3 counts of 667.5(b)PC." The abstract of judgment reflects three enhancements pursuant to Penal Code section 667.5, subdivision (b), but indicates that two of the enhancements were stayed.

Defendant claims two of the three enhancements imposed pursuant to Penal Code section 667.5, subdivision (b), should not have gone to the jury and must be stricken. The People concede two of the enhancements must be stricken. We agree.

As our Supreme Court has made clear, redundant enhancement findings must be stricken. (*People v. Riel* (2000) 22 Cal.4th 1153, 1203.) Because defendant served only one prior prison term, two of the three prior prison term enhancement findings should have been stricken, not stayed.

DISPOSITION

The judgment is modified to strike the two prior prison term enhancements under Penal Code section 667.5, subdivision (b) on which sentence was not imposed. As

modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect this modification and to forward a certified copy to the Department of Corrections and Rehabilitation.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.